# SUPREME COURT OF THE UNITED STATES.

COMMERCE TITLE GUARANTY COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### STATEMENT OF GROUNDS OF JURISDICTION.

Jurisdiction exists because the Circuit Court of Appeals for the Sixth Circuit decided a question of Federal law in a way in conflict with applicable decisions of this Court by holding that under Section 105 of the Revenue Act of 1935 and Section 401 of the Revenue Act of 1936 the taxpayer could not be classified as an insurance company, even though it possessed every characteristic of an insurance company, unless the major portion of its income was derived from premiums, this being in conflict with decisions of this Court in **United States of America v. Home Title Insurance Company**, 285 U. S. 191, and **Bowers v. Lawyers Mortgage Co.**, 285 U. S. 182, which cases adopted the test of the character of business actually done.

Review is sought by certiorari under Section 340-A of the Judicial Code, as amended by the Act of February 13, 1925, and in accordance with Rule 38 of this Court.

## STATEMENT OF CASE.

For purposes of concision petitioner adopts as its Statement of the Case the statement in its Petition for Certiorari entitled "Summary Statement of the Matter Involved," and incorporates same herein by reference.

## SPECIFICATION OF ERRORS.

The Circuit Court of Appeals was in error in holding, in effect, that in no case is a taxpayer entitled to classification as an insurance company unless the greater portion of its income came from premiums, and regardless of the fact that it possessed every characteristic of an insurance company, and that the greater part of its income came from premiums and investment income appropriate to an insurance company.

## ARGUMENT.

If the Circuit Court of Appeals held that petitioner's active business was that of an insurance company, and that the major portion of its income was derived from premiums and investment income, but that it could not be classified as an insurance company under the Revenue Act, because the major portion of its income did not come exclusively from premiums, and if this Court has held that where the business of a taxpayer possesses the characteristics of an insurance company, and the major portion of its income is derived from sources appropriate to an insurance business, then it is entitled to classification as an insurance company, petitioner should be granted certiorari. This is true, because in this event the Circuit Court of Appeals would have adopted a test as to what is an insurance company different from and at variance with the test sanctioned by this Court.

We shall, therefore, confine our brief to dealing with the two propositions:

1. The test adopted by the Circuit Court of Appeals for the Sixth Circuit;

2. The test adopted by this Court.

**The Circuit Court of Appeals Found That Petitioner Possessed Every Characteristic of an Insurance Company, and That the Major Portion of Its Income Was Derived From Premiums Plus Investment Income, But Notwithstanding This, Held, as a Matter of Law, It Was Not Entitled to Classification as an Insurance Company, Because the Major Portion of Its Income Was Not Derived From Premiums.**

Either this heading is an accurate statement of the holding of the Circuit Court of Appeals and its reasons for that holding, or its action in adopting as its own the find-

ings of fact and conclusions of law and opinion of the District Court, sanctions a classic example of a non sequitur. This is true because the effect of the opinion is either to say:

All the facts indicate that the taxpayer was doing an insurance business; therefore, as a matter of law, it is not an insurance company,

Or, to say:

While all of the facts indicate that the taxpayer was doing an insurance business, yet it cannot be classified as an insurance company under the Revenue Act for the sole reason that the major portion of its gross income was not derived from premiums.

The latter, of course, is what the Court did hold, as we shall point out.

In dealing with the characteristics of the petitioner's business it is not necessary to go beyond the Findings of Fact. This is not a case where there is any insistence that there should have been different findings of fact under the record. It is a case where every finding of fact was in accordance with petitioner's contention and where the error lies in the conclusion of law drawn from these findings of fact. It would be difficult for any intelligent non-lawyer to read the District Court's Findings of Fact and not be led by them to the irresistible conclusion that petitioner was an insurance company.

The findings of the Court on this are not merely general and suggestive. The Court expressly found the elements that go to make an insurance company:

That petitioner was incorporated for the purpose of doing a title guaranty business; that its capital structure was appropriate for that purpose; that the office building was a desirable asset as a sanction to its policies; that in

receiving this asset it had not created an excessive investment, but one that was barely sufficient, inasmuch as some prospective policyholders declined to accept its policies until the mortgage on the building was reduced; that the abstract plant was a valuable adjunct to the operation of a title guaranty business and one commonly possessed by a title guaranty company; that from the date of its organization to the end of February, 1940, petitioner issued title guaranty policies on real estate aggregating more than $36,000,000.00 and collected premiums from policies from March 1, 1934, to December 31, 1937, of more than $132,000.00; that petitioner paid taxes to the State of Tennessee as an insurance company; that, with negligible exceptions, its entire income came from the abstract department, premiums on policies and rents from the office building; that its title guaranty business was strictly insurance business in that it guaranteed the title to real estate to purchasers and to mortgagees, but in no instance guaranteed the collectibility of the mortgage debt; that its net income, with trivial exceptions, was derived entirely from premiums and from the abstract department because the office building was operated at a loss; that petitioner's active business was the insurance business and that its handling of the office building was merely the routine handling of an investment; that petitioner would never have been organized for the purpose of handling the office building, but that this was merely selected as a most desirable asset to be used incidentally and in connection with the insurance business, both because of its intrinsic and its advertising value.

Findings of Fact, R. pp. 32-43.

Thus factually the Court finds that the elements are so mixed in petitioner that one would say: It is an insurance company. If told that despite these facts the conclusion of the Court was that the petitioner was not an insurance

company, the irresistible inference would be that this was the result of some binding rule of law negativing that classification for it.

This, however, is not left to inference, for the District Court expressly predicated this conclusion upon its statement that "the significant and compelling facts are that in 1937 the gross earnings of petitioner from its title department were only 18.15 per cent of its total earnings as compared with 23.61 per cent from its abstract department and 58.24 per cent from rentals from space in its office building," etc. (R. p. 54).

The Court further found these facts to be "significant and compelling" because it was of opinion that this Court had held in **Bowers v. Lawyers Mortgage Company**, 285 U. S. 182, and **United States of America v. Home Title Insurance Company**, 285 U. S. 191, that no taxpayer could be entitled to that classification unless the major portion of its gross income was derived from premiums.

If, therefore, this Court did not so hold in these cases, but, on the contrary, did, in effect, hold that where the active business actually done was insurance business, the taxpayer would be entitled to that classification, then clearly the Circuit Court of Appeals not only adopted an incorrect rule in this case, but reached an incorrect result, because that rule was the only possible reason that could have been advanced for denying petitioner the classification of an insurance company.

**The Effect of the Opinions of This Court in Bowers v. Lawyers Mortgage Company, 285 U. S. 182, and United States of America v. Home Title Insurance Company, 285 U. S. 191, Is That a Taxpayer Is Entitled to a Classification as an Insurance Company Where That Is the Business Actively Done and Where the Major Portion of Its Income Is Derived From Premiums Plus Income From Proper Investments.**

The only general rule enounced by the Court in either of these cases was in **Bowers v. Lawyers Mortgage Company**, supra, wherein it was said:

> "While name, charter powers and subjection to state insurance laws have significance as to the business which a corporation is authorized and intends to carry on, the character of the business actually done in the tax years determines whether it was taxable as an insurance company" (285 U. S. 188).

The application by the Court of this rule in the two cases, with the result that in the one the taxpayer was held not to be an insurance company and in the other to be such a company, sheds much light upon its true meaning.

In **Bowers v. Lawyers Mortgage Company**, supra, the taxpayer was incorporated under the law of New York, but its business could have been carried on by a corporation organized under the New York banking laws, as was the business of others engaged in the same line. The taxpayer never at any time insured titles. It received applications for loans, caused an appraisal of the property to be made, and had the title insured by an independent title insurance company. The borrower executed and delivered a bond and mortgage to the taxpayer and received the amount of the loan, less expenses, including the cost of the title insurance. Taxpayer sold the policy and mortgage and in connection with the sale issued a guaranty of the payment

of the principal sum upon maturity, plus interest at a rate less than that stipulated in the bond. It also obligated itself to keep the property and title insured. Its income came from lending fees, extension fees and interest collected between the date of the loan and its later sale and the difference between interest paid by the borrower and that guaranteed to the purchaser, which was termed "premiums." Under these circumstances the Court held that the lending of money on real estate, the sale of bonds and mortgages given by borrowers and the use of money received from purchasers to make additional loans, similarly secured, constituted its principal business (285 U. S. 188).

Characterizing this business, the Court said:

> "The lending fees, extension fees and accrued interest appertain to the business of lending money rather than to insurance and may not reasonably be attributed to the subordinate element of guaranty in respondent's mortgage loan business" (285 U. S. 189).

In analyzing the taxpayer's income a comparison was made between the premiums on the one hand and the aggregate received on the other from lending fees, extension fees and interest. Investment income did not enter into the decision of the case. The Court did point out that the act being considered defined gross income "to be 'investment income,' i. e., interest, dividends and rents, and 'underwriting income,' i. e., premiums earned, less losses and expenses."

Thus the Court apparently allocated investment income as strictly insurance income, but did not find it necessary to consider it, saying:

> "It is not shown that respondent had any investment income within that section" (285 U. S. 189).

The Court found both that the active business of the tax-

payer was lending money, and that the only income (there being no investment income) which could properly be considered as allocable to the insurance business was so-called premiums for guaranteeing collectibility, and that this was far less than the income derived from money lending. Consequently the taxpayer was held not to be an insurance company. Inferentially, the case is authority for our insistence that where the active business is insurance business, and where the major portion of the income is derived from premiums and investment income, the taxpayer is an insurance company. This follows because of the expression by the Court of the view that investment income properly pertains to the business of insurance rather than to that of lending money.

The taxpayer in **United States of America v. Home Title Insurance Company**, supra, was incorporated under the same laws and engaged in the same type of business as was that in **Bowers v. Lawyers Mortgage Company**, with one important difference: it guaranteed the titles to the real estate involved. The court allocated to the insurance business "the amounts received as compensation for insuring titles * * * the fees and charges for examination of titles, appraisals and other services incident to its insurance business," and from this allocation found that the total properly assignable to the insurance business was more than 75 per cent of all of the taxpayer's income.

This warrants allocation in the case at bar of the income derived from the abstract business to petitioner's insurance business.

The category in which investment income should be placed was not considered in **United States of America v. Home Title Insurance Company**, supra.

Distilled, the essence of these cases is:

Determinative is the question of the business in which

the taxpayer is actually engaged. In arriving at this its active business is to be considered and there is allocable to the insurance business investment income, abstract fees, appraisal fees, title examination fees and premiums for the issuance of policies. Income derived from money lending is not allocable to the insurance business.

Applying this test, petitioner is clearly an insurance company. That was the purpose of its incorporation. That was its active business. That engrossed the efforts of its executives. The abstract company was merely an adjunct to it. The office building was an investment which would never have reached petitioner, except for the desire to use it incident to the insurance business.

This conclusion is reinforced by the sources of petitioner's gross income. If investment income, as was held by this Court in the two cases mentioned, is allocable to the insurance business, then this, added to the income from the abstract business and premiums on title policies, constituted all but an infinitesimal portion of petitioner's income, and placed it in the category of an insurance company—more truly an insurance company than the taxpayer in **United States of America v. Home Title Insurance Company**, for petitioner does not, as did the taxpayer in that case, issue any titles insuring collectibility of the mortgage debt.

The vice in the holding of the Circuit Court of Appeals is the fact that it treated investment income as non-insurance income, which stripped petitioner of the characteristics of an insurance company, whereas this Court treated investment income as insurance income, which added to the characteristics of the taxpayer as an insurance company. Moreover, as was pointed out by this Court, rents are specifically included in investment income by the statute itself. It is necessarily true that an insur-

ance company may have investment income without losing its character as an insurance company. As in this case, so in every case, there must be something to guarantee the collectibility of the policies, otherwise they are valueless. True, a case may be imagined where an unneeded investment, producing a so-called investment income, was so great and so disproportionate to the necessities of the case that the term "insurance company" as applied to the taxpayer would be a mere disguise for some other kind of business. This is not true in the case at bar because the Findings of Fact expressly show that petitioner's investment was not excessive, but was meagre and, for a time, insufficient. Moreover, when net income is considered, that from investments was nil and that from premiums and incidental insurance business constituted practically the entire income.

If the investment and the income derived therefrom are properly proportioned to the business and the risk incurred, it would seem necessarily to follow that the fact that this investment income at times exceeded premium income would be immaterial. Indeed, since this Court has held that investment income is as characteristic of an insurance company as premium income, it would seem that a comparison between the two classes of income is entirely unnecessary.

If the comparison be made, it cannot be determinative of the character of a taxpayer's business. If it were, the taxpayer would have a protean business. In years in which the business of writing insurance was good and returns from investments were lean, it would be an insurance company. In years where, as a result of conditions beyond its control, premiums fell and investment income rose, it would cease to be an insurance company. Moreover, no company formed for the sole purpose of doing an insurance business, and with assets including an invest-

ment account perfectly proportioned from the beginning for that business, could initially be an insurance company. Premiums would have to be built up, whereas its investment income derived from investments made from paid in capital and surplus would begin ab initio in amounts probably larger than the premiums produced during the growing period.

## CONCLUSION.

The general test is "the character of the business actually done." As to this the Circuit Court of Appeals agrees with this Court.

Specific tests are the active business done and the source of the taxpayer's income. In applying these specific tests both premiums and investment income (including rents) are held by this Court to be strictly insurance income. Premiums only are held by the Circuit Court of Appeals to be insurance income, and investment income is otherwise allocated.

In so holding the Circuit Court of Appeals not only reached an incorrect conclusion in this case, but wrote a gloss upon the opinions of this Court in **Bowers v. Lawyers Mortgage Company**, 285 U. S. 182, and **United States of America v. Home Title Insurance Company**, 285 U. S. 191, which, unless corrected, will not only be confusing, but will adopt a rule entirely inconsistent with the rule adopted by this Court.

Thus it is the Circuit Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this Court.

Respectfully submitted,

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